

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	File No. EB-01-TS-040
ACR Electronics, Inc.)	NAL/Acct. No. 200532100004
Fort Lauderdale, Florida)	FRN No. 0008044232

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: October 27, 2004

Released: November 1, 2004

By the Commission:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find ACR Electronics, Inc. (“ACR”) apparently liable for a forfeiture in the amount of seventy five thousand dollars (\$75,000) for marketing unauthorized equipment in willful and repeated violation of Section 302(b) of the Communications Act of 1934 as amended (“Act”),¹ and Section 2.803(a) of the Commission’s Rules (“Rules”).²

II. BACKGROUND

2. In February 2004, the Enforcement Bureau (“Bureau”) received a complaint alleging that ACR was marketing through outdoor and sporting publications and websites a new personal location beacon (“PLB”), 406 GPS PLB-200 (“PLB-200”), under the names “TerraFix” for land use, “AquaFix” for marine use, and “AeroFix” for aviation use, which had not been authorized by the Commission. In support, the complainant provided evidence that the PLB-200 was explicitly being described as “FCC approved,” and marketed to consumers. Specifically, the complainant submitted a TerraFix brochure, which stated that the PLB-200 was “APPROVED for sale in the U.S.,” and further provided evidence that at least one retailer was accepting orders for the PLB-200. In the latter regard, the complainant submitted an e-mail order confirmation, dated February 25, 2004, from Boat U.S. for the purchase of one “AquaFix 406 GPS I/O Plb,” “Item 5321153,” priced at “\$749.99.”³

3. In response to the complaint, the Bureau issued a letter of inquiry (“LOI”) to ACR on March 29, 2004.⁴ ACR filed a response to the LOI on April 28, 2004,⁵ and supplemented its response on

¹47 U.S.C. § 302a(b).

²47 C.F.R. § 2.803(a).

³Under “Status,” the submitted confirmation order noted “051504,” which appears to represent the delivery date.

⁴See Letter from Joseph P. Casey, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Paul Frank, President, ACR Electronics, Inc. (March 29, 2004).

May 4, 2004.⁶

4. In its response, ACR described the PLB-200 TerraFix, AquaFix, and AeroFix as “essentially the same” model marketed to different outdoor segments that is the “next generation” of PLB and is based on the technological design of its current certified PLB-100 model with “the single important difference that the PLB-200 has a built-in global positioning technology (GPS) incorporated into each unit.”⁷ ACR did not dispute that the PLB-200 model has not been certified under the Commission’s equipment authorization procedures, but maintained that the units “have never been activated and exist only as photographic or mock-up prototypes intended to educate ACR representatives and customers (equipment retailers) of products that are under development and for which authorization will be sought in the future.”⁸ In this connection, ACR explained that it does not sell its products, including PLBs, directly to end users, but rather sells “through distribution to retailers,” who are “approved by the ACR sales representative for the particular territory” and “are professional buyers, and unlike many end users, familiar with the process of launching a new telecommunications product and fully cognizant that FCC approval is required of many products.”⁹ ACR claimed that its “PLB-200 was not promoted to the general public, but rather to industry-specific representatives and retailers who clearly aware that the equipment was not for sale.”¹⁰

5. As detailed below, ACR acknowledged, and provided documentation to show, that it displayed PLB-200 mock-ups at trade shows, made industry presentations, and provided related brochures, price lists and other information to the press and to retailers, and that such displays, presentations and distributed materials were not accompanied by the requisite disclaimer notice set forth in Section 2.803(c).¹¹ And, contrary to ACR’s representations, its documentation showed that it, in fact, promoted the PLB-200 to the general public by advertising in outdoor and sporting publications, and that such advertisements also were not accompanied by the requisite Section 2.803(c) disclaimer notice, indicating that the device has not been approved by the Commission and that it may not be offered for sale or lease, or sold or leased, until such approval is obtained.

A. Industry marketing.

1. Distributed promotional materials.

6. With respect to its distributed promotional materials, ACR submitted a TerraFix “press kit” or “packet,” which consisted of a folder containing two inserted brochures (“brochures”) and two

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⁵See Letter from Bruce Eisen, Esq., Kaye Scholer LLP, to Brian Butler, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (April 28, 2004) (“LOI Response”).

⁶See Letter from Bruce Eisen, Esq., Kaye Scholer LLP, to Brian Butler, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (May 4, 2004) (“LOI Supplement”).

⁷LOI Response at 1-2.

⁸*Id.* at 1.

⁹*Id.* at 2.

¹⁰*Id.* at 6.

¹¹47 C.F.R. § 2.803(c).

press releases.¹² ACR acknowledged that 25 complete press kits and approximately 700 brochures¹³ were distributed to the media and to retailers at the Shooting Hunting Outdoor Trade Show (“SHOT”) in Las Vegas, Nevada.¹⁴ ACR further acknowledged that that an unspecified number of the press kits¹⁵ were mailed to the media prior to, and distributed to media and retailers at, the Outdoor Retailer Winter Market Show (“OR”) in Salt Lake City, Utah.¹⁶ On the front cover of the TerraFix folder, it captioned ACR’s logo, depicted the TerraFix model, and stated in bold print “Personal Locator Beacons, New and Improved, For Sale in the U.S.,” in contrast, on the bottom of back cover of the folder, in small print, it stated “New Integral GPS PLB Available April -- pending FCC approval.”¹⁷

7. One of the brochures included in the press kit was an outdoor product brochure that included, among descriptions of its line of outdoor products, the TerraFix PLB-200. The outdoor brochure described the TerraFix PLB-200 as “the next generation PLB,” because it uses “GEOSAR satellites that are in geostationary high-earth orbit and can instantly relay emergency transmissions” in a “matter of seconds.”¹⁸ This brochure did not include any disclaimer; to the contrary, on the “PLB Specifications” page of the brochure, under “Certification,” it stated that the PLB-200 was “FCC approved.”¹⁹ The second brochure included in the TerraFix press kit, which featured the TerraFix PLB-200 exclusively, stated prominently on the front cover “Personal Locator Beacon APPROVED for sale in the U.S.” Like the outdoor product brochure, this brochure did not include any notice that the PLB-200 had not been approved by the Commission. The TerraFix press releases, captioned “ACR Introduces Next Generation of Personal Locator Beacons,” included in the press kit, stated that ACR is unveiling the TerraFix 406, which utilizes GPS components and is “targeted to provide outdoor enthusiasts with the smallest and most functional PLB available in the world ... (pending FCC approval),” enabling such enthusiasts “to broadcast critical GPS coordinates, providing Search and Rescue crews with exact latitude and longitude thereby increasing emergency response speed by pinpointing positioning within 100 yards.”²⁰

8. ACR also submitted a copy of an AquaFix brochure.²¹ The front cover of the front jacket of the AquaFix brochure stated prominently “Personal EPIRB APPROVED for sale in the U.S.” ACR claimed that the AquaFix brochure “had only the most minimal exposure,”²² but did not specify how many

¹²*Id.* at Exhibit 2. *See also* LOI Supplement, Exhibit 2. ACR’s LOI Response included a photocopy of the TerraFix press kit, and its LOI Supplement included an original TerraFix press kit.

¹³LOI Response at 3.

¹⁴SHOT was held from February 12 through 15, 2004.

¹⁵LOI Response at 3.

¹⁶OR was held from January 30 through February 2, 2004.

¹⁷LOI Supplement at Exhibit 2.

¹⁸*Id.*

¹⁹*Id.*

²⁰LOI Response at Exhibit 2; LOI Supplement at Exhibit 2.

²¹LOI Response at Exhibit 10.

²²*Id.* at 4.

and to whom the brochures were issued.²³

9. In addition, ACR submitted an “Internal Use ONLY -- Not for Distribution” 2004 price list (printed January 7, 2004),²⁴ and a distributed “Outdoor Dealer Price List and Order Form, Effective through 31 December 2004” price list (printed January 26, 2004).²⁵ The internal price list set the TerraFix’s net price at \$515.00 and stated “FCC Approval [is] Pending April 1, 2004.” In contrast, the distributed price list set the price for and identified the TerraFix as “FCC PLB-200” and contained no disclaimer whatsoever regarding FCC approval.²⁶ ACR indicated that 200 price lists were prepared for distribution, but claimed that a “significantly less,” unspecified number of lists were actually distributed at the SHOT and OR trade shows.

2. Trade show and other presentations.

10. With respect to presentations, ACR acknowledged that it displayed a TerraFix mock-up, and distributed related TerraFix press kits, price lists and press releases prior to, and at, the SHOT and OR trade shows. ACR further acknowledged that the requisite Section 2.803(c) trade show disclaimer was not displayed in its booth, or as previously stated, in its distributed promotional materials. According to ACR, the display of a “mock-up dummy . . . with a plastic shell” and the distribution of informational materials did not manifest an intent or attempt to sell TerraFix PLB-200 units.²⁷

11. ACR also acknowledged that it made PowerPoint presentations to select accounts, such as Yamaha on October 2, 2003, Dick’s Sporting Goods on April 6, 2004, and Parts Unlimited on April 13, 2004.²⁸ The representative PowerPoint material²⁹ featured the “‘NEW’ PLB models early 2004,” explained and contrasted the “state of the art” and more precise GPS technology incorporated in the 2004 PLB-200 models with the Doppler Shift technology incorporated in the preceding PLB-100 models, and finally, under the caption “Regulations, Federal Communications Commission” indicated that PLBs must pass a variety of tests.³⁰ According to ACR, a “Not for Sale Pending FCC approval” sticker was placed on some, but not all, of the presented material;³¹ however, the PowerPoint material submitted with its LOI response did not include any such stickers.

²³In contrast to the TerraFix and AquaFix models, it should be noted that ACR stated that it had “not marketed the ‘AeroFix’ in any way other than to allow its sales representatives to use its name in conversation with retailers.” LOI Response at 4.

²⁴*Id.* at Exhibit 4.

²⁵*Id.* at Exhibit 3.

²⁶*Id.*

²⁷*Id.* at 3.

²⁸*Id.* at 4.

²⁹*Id.* at Exhibits 11-12.

³⁰*Id.*

³¹LOI Response at 4.

B. Public marketing.

12. Finally, although ACR represented “that the PLB-200 units were never directed at the general public,”³² its documentation establishes otherwise. Specifically, ACR’s documentation establishes that it, in fact, launched a substantial media campaign by advertising the PLB-200 in multiple outdoor and sporting magazines and catalogues that were clearly directed at and targeted to the consuming general public.³³ According to ACR’s media schedule,³⁴ it advertised the PLB-200 in:

- Outside Magazine’s 2004 April Buying Guide (circulation: 650,000);
- Backpacker Magazine’s 2004 March Buyer’s Guide, April and Summer issues and Camper Magazine (circulation: 295,000);
- Alaska Magazine’s 2004 May issue (circulation: 185,000);
- Rock ‘N Ice Magazine’s 2004 June issue (circulation: 34,000);
- Safari Club Magazine’s 2004 May/June issue (circulation: 39,500);
- Safari Times’ 2004 June issue (circulation: 39,500);
- Rocky Mountain Sports Magazine’s 2004 April and May issues (circulation: 60,000);
- Paddler Magazine’s 2004 May/June issue (circulation: 59,000);
- Kayak Magazine’s 2004 Spring issue (circulation: 59,000);
- Couloir Magazine’s 2004 Winter issue (circulation: 41,000);
- Backcountry Magazine’s 2004 January and February issues (circulation: 14,000);
- Adventure Sports Magazine’s 2004 April and May issues (circulation: 25,000); and
- Outdoor Retailer/Outdoor Business’ 2004 Winter and Summer Market guides (circulation: n/a).³⁵

³²*Id.* at 6.

³³*Id.* at 4, Exhibits 8-9. ACR spent approximately one third (\$100,00) of its advertising budget (\$300,000) from January through March 2004, promoting the unauthorized PLB-200 in outdoor and sporting magazines and catalogues. *Id.* at Exhibit 9.

³⁴*Id.*

³⁵*Id.* With the exception of Outdoor Retailer/Outdoor Business Market Guides, it appears that all the publications that ran ACR’s PLB-200 advertisements were clearly directed toward the ultimate end-users, *i.e.*, consumers. For instance, Outside Magazine “[b]ack in 1978 ... stated that [it] was ‘dedicated to covering the people, sports and activities, politics, art, literature, and hardware if the outdoors,’ an editorial goal that that has stuck ever since ... [it] has done an amazing job of bringing *people* in contact with the outside world.” [Http://www.outside.away.com](http://www.outside.away.com). (emphasis added). Outside Magazine has a circulation of 650,000 and its Buyer Guide is distributed to “news racks” throughout the country and “gets passed around beyond subscribers. It gets read by a lot of other readers.” [Http://www.redoxx.com/articles/news-outside-gazette.html](http://www.redoxx.com/articles/news-outside-gazette.html).

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In this connection, ACR submitted a representative full-page ad that appeared in one of the publications, which described the “**NEW** TerraFix 406 Personal Locator Beacon, the best way to be found fast,” depicted the model in terms of actual size, and stated at the bottom of the page in black border “New Integral GPS PLB Available April -- Pending FCC Approval.”³⁶

III. DISCUSSION

13. Section 302(b) of the Act provides that “[n]o person shall manufacture, import, sell, offer for sale, or ship devices of home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.” Section 2.803(a)(2) of the Commission’s implementing regulations provides that:

Except as provided elsewhere in this section, no person shall sell or lease, or offer for sale or lease (including *advertising* for sale or lease), or import, ship, or distribute for the purpose of selling or leasing or offering for sale or lease, any radio frequency device unless ... [i]n the case of a device subject to certification, such device has been authorized by the Commission in accordance with the rules in this chapter and is properly identified and labeled as required by § 2.925 and other relevant sections in this chapter [emphasis added].

It is undisputed that the PLB-200 model is an intentional radiating device,³⁷ and as discussed below, is subject to the Commission’s certification procedures and related marketing restrictions.

14. Under Section 15.201(b) of the Rules,³⁸ manufacturers are required to submit documentation test results to, and be “certificated” by, the Commission “prior to marketing” intentional radiating devices.³⁹ However, in limited circumstances, manufacturers are allowed to market devices prior to certification. Specifically, Section 2.803(c) of the Rules allows manufacturers to advertise or display:

[A]t a trade show or exhibition, prior to equipment authorization ... *provided* that the advertising contains, and the display is accompanied by, a conspicuous [disclaimer] notice worded as follows: This device has not been authorized as required by the rules of the Federal Communications Commission. This device is not, and may not be, offered for sale or lease, or sold or leased, until authorization is obtained.

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Similarly, Backpacker’s Magazine (circulation: 295,000) and Couloir Magazine (circulation: 41,000), both geared toward consumers, respectively describe their “mission” in terms of “encourage[ing] and enable[ing] *people* to experience wilderness,” and “inform[ing] and inspir[ing] *skiers* and *snowboarders* who ‘earn their turn in the backcountry.’” [Http://www.backpacker.com/masthead/0,3131,,00.html](http://www.backpacker.com/masthead/0,3131,,00.html); [Http://www.couloirmag.com/about_us](http://www.couloirmag.com/about_us).

³⁶*Id.* at Exhibit 8.

³⁷Section 15.3(o) of the Rules, 47 C.F.R. § 15.3(o), defines an intentional radiator as a “device that intentionally generates and emits radio frequency energy by radiation or induction.”

³⁸47 C.F.R. § 15.201(b).

³⁹Sections 2.907(a) and (b), 47 C.F.R. §§ 2.907(a) and (b), provides, in pertinent part, that certification “is an equipment authorization issued by the Commission, based on representations and test data submitted by the applicant” and that it “attaches to all units subsequently marketed by the grantee which are identical ... to the sample tested”

In 1976, the Commission expanded the “trade show” exception of Section 2.803(c) and allowed manufacturers to advertise devices to the general public, prior to certification, provided such advertisements include the above disclaimer.⁴⁰ Thus, ACR was allowed to display and distribute promotional materials about the PLB-200 at the OR, SHOT trade shows and like industry forums, and advertise the PLB-200 in sporting and outdoor publications and related websites, prior to certification, *provided* that its display, promotional materials and advertisements conspicuously displayed the requisite disclaimer notice.

A. Industry marketing.

15. ACR conceded, and its documentation demonstrated, that the specific disclaimer notice required by Section 2.803(c) was not displayed in *any* of the promotional materials distributed to the media and the retailers. Significantly, the two TerraFix brochures, which were included in the TerraFix press kit and also widely distributed separately at the two trade shows, not only failed to include the requisite disclaimer notice, they also falsely represented that the device was approved by the Commission. In this regard, one of the brochures prominently stated on the front cover that the device was “APPROVED for sale in the U.S.,” while the other brochure stated on the “PLB Specifications” page that the device was “FCC approved.” Similarly, the AquaFix brochure prominently stated on the front cover that the device was “APPROVED for sale in the U.S.” While the TerraFix press kit folder stated “pending FCC approval,” this is not the disclaimer language explicitly required by Section 2.803(c) and, in any event, this statement was placed in small print in a non-conspicuous location on the back cover of the folder. As such, this statement clearly did not comport with the requirements of Section 2.803(c). The press releases included in the TerraFix folder likewise failed to include the disclaimer language explicitly required by Section 2.803(c); and, the “pending FCC approval” statement that was included was placed in a non-conspicuous place within the text of the press releases. The 2004 TerraFix price lists distributed at the trade shows also failed to include a disclaimer notice. Additionally, ACR admitted that no disclaimer notice was included within some of the PowerPoint presentations with select industry accounts, and the “Not for Sale Pending FCC Approval” sticker that was allegedly placed on other PowerPoint presentations did not comport with the requirements of Section 2.803(c).

16. The requisite disclaimer notice also was not displayed in ACR’s OR and SHOT trade show booths. In this regard, ACR claimed that it only displayed a “mock-up dummy” of the TerraFix model.⁴¹ ACR’s claims notwithstanding, exhibited non-working mock-ups of non-authorized devices are not exempt from the disclaimer notice requirement of Section 2.803(c). The disclaimer requirement applies to all radio frequency devices that are in the “development, design or preproduction stages” and that are subject to the Commission’s equipment authorization procedures.⁴² ACR claimed that because the

⁴⁰ See *Interpretation and Amendment of Part 2, Section 2.803 of the Commission’s Rules Relating to the Marketing (Advertising) of RadioFrequency Devices*, 62 FCC 2d 728, 729 ¶ 8 (1976) (interpreting the “trade show” exception of Section 2.803 to allow manufacturers to advertise “non-approved equipments – providing such advertising contains notice that the equipments have not been authorized and may not be offered for sale or lease or sold or leased”) (“1976 Order”); see also *Interpretation and Amendment of Part 2, Section 2.803 of the Commission’s Rules Relating to the Marketing of RadioFrequency Devices*, RM Dockets 2573 and 2601, 58 FCC 2d 784 (1976) (adopting the trade show exception of Section 2.803).

⁴¹ LOI Response at 3.

⁴² *Matter of Revision of Part 2 of the Commission’s Rules Relating to the Marketing and Authorization of Radio Frequency Devices*, 12 FCC Rcd 4533, 4533 ¶ 1 (1996) (“1996 Order”), *recon. granted*, 13 FCC Rcd 12928 (1998). Manufacturers who exhibited and/or distributed promotional materials regarding non-working mock-ups or prototypes of radio frequency devices at trade shows, without the conspicuous disclaimer notice, have been found in violation of Section 2.803(a). See *Palmcom International Ltd.*, 8 FCC Rcd 332 (FOB 1993); see also (continued....)

PLB-200 model is based on “technology incorporated into the PLB-100, it could be considered a prototype of a product properly authorized,”⁴³ subject to Section 2.803(c)(1)’s “Prototype Not for Sale” disclaimer.⁴⁴ ACR’s claim is disingenuous at best, given that it did not display the prototype disclaimer, and that its promotional materials referenced the new and improved next generation PLB that incorporates the more precise GPS (over the prior Doppler Shift) technology.⁴⁵

17. Also, contrary to ACR’s claim that its retailers are professional buyers who are familiar with, and would not offer new telecommunications products without, the Commission’s equipment authorization, the complaint submitted evidence that at least one retailer was accepting purchase orders for the PLB-200.⁴⁶ Moreover, the Bureau staff found several retail websites that were offering the TerraFix and AquaFix PLB-200s for sale. Specifically, the Bureau staff observed that the PLB-200s were advertised on the Boat U.S., West Marine, Mountain Gear and The Sportsman’s Guide retail websites, and that such advertisements listed prices, specified delivery dates,⁴⁷ and enabled consumers to place orders. Notably, the Mountain Gear and The Sportsman’s Guide retail websites, respectively, stated that the PLB was “FCC approved” and represented that the PLB “[e]xceeds rigorous testing standards of ... [the] FCC.”

Indeed, the TerraFix PLB-200 was offered for sale, without the requisite disclaimer notice, in the Recreational Equipment, Inc. (“REI”) mail order catalogue sent to consumers during the week of September 7, 2004.⁴⁸ The fact that PLB-200s were being and continued to be offered for sale on retail

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GVC Technologies, Inc., 8 FCC Rcd 6667 (FOB 1993). Regarding the display of non-authorized equipment, the *Palmcom* decision stated:

Although the device itself may have been a non-functioning prototype, the displaying of a device that represents a radio frequency device that had not been authorized by the FCC violates Section 2.803 of the FCC’s rules. The displaying of the device, moreover, was a form of advertising which is also prohibited by Section 2.803. The apparent purpose in displaying the device was to market it, namely, to generate either immediate or future orders to buy the device. Often at a trade show or even in a store, there is no intent to sell actual device on display, but the device is used to generate orders. The actual device that is sold may not have been constructed or assembled at the time a purchase order is placed.

8 FCC Rcd at 332.

⁴³LOI Response at 5.

⁴⁴Section 2.803(c)(1) of the Rules, 47 C.F.R. § 2.803(c)(1) provides:

If the product being displayed [at an industry trade show] is a prototype of a product that has been properly authorized and the prototype, itself, is not authorized due to differences between the prototype and the authorized product, the following disclaimer notice may be used in lieu of the notice stated in paragraph (c) ... of this section:

Prototype. Not for Sale.

⁴⁵*See, e.g.*, LOI Response at Exhibits 11-12.

⁴⁶*See* note 3 and accompanying text, *supra*.

⁴⁷For example, the Mountain Gear website indicated that the PLB-200 would be “available to ship May 15, 2004.”

⁴⁸REI’s website indicates that it has over 70 retail stores in the U.S. and also serves the needs of “outdoors people” through direct sales via the internet, telephone and mail. REI further indicates that it is the nation’s largest (continued....)

websites and in retail catalogues is hardly surprising, given that ACR's displays, presentations and distributed materials did not contain the requisite disclaimer notice, and indeed some contained misleading information, regarding Commission authorization.

18. In the instant case, we thus find that ACR displayed a PLB-200 model, made industry presentations, and distributed related promotional materials, prior to certification of the device without the disclaimer notice set forth in Section 2.803(c), in apparent willful and repeated violation of Section 302(b) of the Act and Section 2.803(a) of the Rules.

B. Public marketing.

19. As stated previously, in 1976, the Commission authorized manufacturers to advertise to the general public radio frequency devices that have not been certified or otherwise approved, provided such advertisements display the requisite disclaimer notice in a conspicuous manner. The Commission explained that the "prime or essential purpose" of Section 2.803 is "to keep unapproved and offending devices out of the stream of commerce," and that the disclaimer notice serves to alert the public "to the fact that many if not most of the multitude of RF devices proliferating in the marketplace require scrutiny by this Commission before marketing"⁴⁹ Absent the conspicuously placed disclaimer notice requirement, it would be "unrealistic to permit consumer devices to be offered for sale to potentially millions of people and expect the delivery of the devices to be delayed while awaiting the Commission authorizations."⁵⁰

20. ACR's claim that the PLB-200 was only marketed to industry representatives and retailers to "educate ... [them] of products under development and for which authorization will be sought in the future"⁵¹ -- and was never promoted to or directed at the general public⁵² -- is simply belied by the record. Indeed, the record establishes that ACR knowingly and intentionally advertised in, and thus promoted and directed the unauthorized PLB-200 to the general public through, multiple outdoor and sporting magazines and catalogues. Such advertisements did not include the disclaimer notice required by Section 2.803(c). ACR's claim that "virtually all the ... promotional information shows that the equipment is 'pending FCC approval'" is unavailing.⁵³ The record establishes that the wording and placement of ACR's "pending FCC approval" statement did not comport with the requirements of Section 2.803(c), and thus did not alert the general public that FCC approval must be obtained prior to any sales, leases, or offers to sell and/or

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consumer cooperative with over 2 million members. See <http://www.rei.com>. Thus, it appears likely that REI's marketing of the unauthorized PLB-200 is reaching substantial numbers of consumers.

⁴⁹1976 Order, 62 FCC 2d at 729 ¶ 5.

⁵⁰1997 Order, 12 FCC Rcd at 4537 ¶ 7.

⁵¹LOI Response at 1.

⁵²See notes 10 and 32 and accompanying text, *supra*.

⁵³See, e.g., *ASLAN Computer Corp.*, 9 FCC Rcd 2030, 2030 ¶ 5 (FOB 1994) (finding a disclaimer notice "DEMO NOT FOR SALE" for an uncertified computer model insufficient and a violation of Section 2.803, which sets forth "very specific" disclaimer language which is "intended to convey to the general public or prospective purchasers the fact that a particular device needs FCC authorization, does not have it, and cannot be sold or offered for sale until such authorization has been granted"); *California Komputer Test, Inc.*, 9 FCC Rcd 1046, 1046 ¶ 6 (FOB 1994) (finding that an advertisement in a newspaper, and a display in a retail outlet, of an uncertified computer "[un]accompanied by a conspicuous notice as specified in Section 2.803" violated the Commission's equipment marketing requirements).

lease of such equipment.⁵⁴

21. In the instant case, we find that ACR apparently willfully and repeatedly violated Section 302(b) of the Act and Section 2.803(a) of the Rules, by advertising the PLB-200 to the general public, *prior* to certification without the disclaimer notice required by Section 2.803(c).

C. Proposed Forfeiture.

22. Section 503(b) of the Act,⁵⁵ and Section 1.80(a) of the Rules,⁵⁶ provide that any person who willfully or repeatedly fails to comply with the provisions of the Act or the Rules shall be liable for a forfeiture penalty. For purposes of Section 503(b) of the Act, the term “willful” means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Commission’s rules, and “repeatedly” means more than once.⁵⁷ Based upon the record before us, it appears that ACR willfully and repeatedly violated Section 302(b) of the Act and Section 2.803(a) of the Rules by exhibiting and marketing the PLB-200s, which had not been certified in accordance with the Commission’s equipment authorization procedures.

23. Section 503(b) of the Act authorizes the Commission to assess a maximum forfeiture of \$11,000 for each violation, or each day of a continuing violation, by a non-common carrier or other entity not specifically designated in Section 503(b), up to a statutory maximum forfeiture of \$87,500 for any single continuing violation;⁵⁸ and Section 1.80(b)(4) specifically establishes a base forfeiture amount of \$7,000 for each violation involving the marketing of unauthorized equipment.⁵⁹ In the present case, we find that each of ACR’s displays and advertisements of, and presentations, distributions of informational and promotional materials regarding, the uncertified PLB-200 constitutes a separate violation.

24. In determining the appropriate forfeiture amount, Section 503(b)(2)(D) of the Act⁶⁰ requires the Commission to consider factors, such as “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to

⁵⁴See notes 3 and 47 and accompanying text, *supra*.

⁵⁵47 U.S.C. § 503(b).

⁵⁶47 C.F.R. § 1.80(a).

⁵⁷See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

⁵⁸47 U.S.C. § 503(b). Section 503(b)(2)(C) provides for forfeitures up to \$10,000 for each violation in cases not covered by subparagraph (A) or (B), which address forfeitures for violations by broadcast licensees and common carriers, among others. In accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, Pub. L. 104-134, Sec. 31001, 110 Stat. 1321, the Commission has increased the maximum statutory forfeiture under Section 503(b)(2)(C) for each violation to \$11,000. See 47 C.F.R. § 1.80(b)(3); *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000). Subsequent increases of the maximum statutory forfeiture amount had not taken effect at the time of the behavior in issue. See *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 19 FCC Rcd 10945 (2004).

⁵⁹47 C.F.R. § 1.80(b)(4).

⁶⁰47 U.S.C. § 503(b)(2)(D).

pay, and such other matters as justice may require.”⁶¹ Having weighed the factors, we find that a \$75,000 forfeiture is appropriate in light of ACR’s relative ability to pay a forfeiture,⁶² and the fact that ACR knowingly launched a substantial media campaign promoting its unauthorized equipment to the general public. Given the substantial degree of apparently unlawful equipment marketing, we recognize that straightforward application of the base forfeiture amount for each separate apparent violation would result in a significantly higher proposed forfeiture. Nevertheless, we believe that, in the instant case, the \$75,000 proposed forfeiture is sufficient to deter future violations of the Act and Rules and to ensure that uncertified equipment is not marketed in industry or public forums without the requisite disclaimer notices.

25. We note that the company has committed “to make certain that ACR is in complete compliance with the rules” and “intends to add to its promotional materials involving the referenced PLB[-200s] the exact wording of the disclaimers set forth in the Rules.”⁶³ We further note that ACR recently received Commission equipment authorization for the PLB-200.⁶⁴ The Commission expects that corrective action will be implemented to bring past violations into compliance.⁶⁵ However, such corrective action does not nullify or mitigate ACR’s past marketing violations, and thus does not warrant any reduction in the proposed forfeiture.⁶⁶

IV. ORDERING CLAUSES

26. Accordingly, **IT IS ORDERED** that, pursuant to pursuant to Section 503(b) of the Act⁶⁷ and Sections 0.111, 0.311 and 1.80 of the Rules,⁶⁸ ACR Electronics, Inc. **IS** hereby **NOTIFIED** of its

⁶¹*The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17110 (1997), *recon. denied* 15 FCC Rcd 303 (1999).

⁶²In this connection, we note that ACR is listed as a subsidiary of the global Cobham PLC. *See* LOI Response, Exhibits 11-12; <http://www.chelton.com/ltd/ltd>. Cobham PLC operates “in three sectors – aerospace systems, avionics and flight operations & services” and had reported 2002 annual revenues of \$1,178 billion). <http://www.biz.yahoo.com/ic/57/57756.html>. *See Forfeiture Policy Statement*, 12 FCC Rcd at 17098 ¶ 20 (noting that the identity of a violator may be relevant in assessing and adjusting forfeitures, because, for example, a “\$10,000 forfeiture for a particular offense will [not] have the same deterrent effect on a small computer vendor, a moderately-sized radio common carrier, and a \$10 billion per year local telephone company or interexchange carrier”); *see also KASA Radio Hogar, Inc.*, 17 FCC Rcd 6256, 6258-59 ¶¶ 4-5 (2002) (stating that it is appropriate to consider the income derived from its consolidated operations to determine whether a violator “can sustain a forfeiture”).

⁶³LOI Response at 6.

⁶⁴On October 5, 2004, the Commission’s Office of Engineering and Technology granted ACR’s PLB-200 equipment authorization (FCC Identifier B66ACR-PLB-200).

⁶⁵*See AT&T Wireless Services, Inc.*, 17 FCC Rcd 7891 (2002), *forfeiture ordered*, 17 FCC Rcd 21866, 21875-76 ¶¶ 26-28 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099, 6099 ¶ 7 (1994); *see also TCI Cablevision of Maryland, Inc.*, 7 FCC Rcd 6013, 6014 ¶ 8 (1992) (considering subsequent corrective actions as a mitigation of past violations “would tend to encourage remedial rather preventative action”).

⁶⁶*Id.*

⁶⁷47 U.S.C. § 503(b).

⁶⁸7 C.F.R. § 0.111, 0.311 and 1.80.

APPARENT LIABILITY FOR A FORFEITURE in the amount of seventy five thousand dollars (\$75,000) for willfully and repeatedly violating Section 302(b) of the Act and Section 2.803(a) of the Rules.

27. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, ACR Electronics, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

28. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259.

29. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption.

30. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

31. Requests for payment of the full amount of this NAL under an installment plan should be sent to: Chief, Revenue and Receivable Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.⁶⁹

32. **IT IS FURTHER ORDERED** that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by first class mail and certified mail return receipt requested to Paul Frank, President, ACR Electronics, Inc., 5757 Ravenswood Road, Ft. Lauderdale, Florida 33312, and Bruce A. Eisen, Esq., Kaye Scholer LLP, 901 15th Street, N.W., Suite 1100, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁹See 47 C.F.R. § 1.1914.